APPEAL NO. 991463

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on June 21, 1999. With respect to the issue before her, the hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBS) for the second quarter. In his appeal, the claimant essentially argues that the determinations that he did not make a good faith effort to look for work in the filing period for the second quarter and that he is not entitled to second quarter SIBS are against the great weight of the evidence. The claimant also asserts error in an evidentiary ruling made by the hearing officer. In its response, the respondent (self-insured) urges affirmance. The self-insured did not appeal the determination that the claimant's unemployment in the second quarter filing period was a direct result of his impairment.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____; that he reached maximum medical improvement on February 24, 1998, with an impairment rating of 16%; that he did not commute his impairment income benefits; that the claimant earned no wages in the filing period for the second quarter; and that the second quarter of SIBS ran from April 28 to July 27, 1999. The filing period was identified as the period from January 28 to April 27, 1999.

The claimant, who is 52 years old, testified that he was injured in the course and scope of his employment as a fire fighter, a position he held for 29 years. Specifically, he stated that he was going down wooden stairs and one of the stairs broke, causing him to stumble. He explained that he was able to catch himself before he fell and that he sustained a left ankle strain, lumbar strain, and "tennis elbow" in the left arm, as a result of the incident.

In a report of November 3, 1997, Dr. M, who is apparently the claimant's treating doctor, stated that the claimant had undergone a functional capacity evaluation (FCE) on October 31, 1997, which demonstrated that he could perform at the medium physical demand level. Dr. M noted that the claimant "has difficulty with material handling activities which require prolonged standing and walking, including carrying, pushing, and pulling"; that he can "sit constantly, frequently stand and walk, and has occasional bending, kneeling, climbing stairs, climbing ladders, reaching forward, and reaching overhead abilities"; and that he "is unable to squat." The self-insured introduced a May 17, 1999, FCE, which revealed that the claimant was able to work at the light to medium physical demand level.

The claimant testified that during the filing period for the second quarter he made 34 contacts with potential employers but that he did not have any interviews and did not

receive any job offers. He testified that he was advised by a Texas Workers' Compensation Commission employee that he only needed to apply for three jobs per week during the filing period. He generally made his three contacts on one day of the week. He acknowledged that he made his 34 employment contacts over 11 days of the filing period. The claimant testified that he used the telephone book, the internet, newspapers, and job lines to identify potential employers and that he made all but one of his contacts by telephone. The claimant testified that in addition to looking for work, he attended community college and completed six semester hours in the filing period. The claimant testified that he went to school from 5:30 p.m. to 9:50 p.m. Mondays and Wednesdays and from 5:30 p.m. to 6:50 p.m. on Tuesdays and Thursdays. He stated that he also attended labs three to four hours per week.

The hearing officer determined that the claimant did not make a good faith effort to look for work in the relevant filing period. That question presented a question of fact for the hearing officer to decide. It was the hearing officer's responsibility, as the sole judge of the evidence under Section 410.165(a), to consider the evidence concerning the claimant's job search efforts in the filing period, in conjunction with his college attendance, and to determine if the claimant sustained his burden of proving that he made a good faith effort to look for work commensurate with his ability to work. In making her good faith determination, the hearing officer was free to consider the nature and extent of the employment contacts made. Texas Workers' Compensation Commission Appeal No. 960268, decided March 27, 1996. To that end, the hearing officer noted that the claimant only looked for work one day each week and that he made only one employment contact in person. The hearing officer stated "[a]lthough the Claimant appeared sincere in his testimony that he intends to eventually get a job and graduate from college, the evidence was insufficient to establish that he made a good faith effort to obtain employment commensurate with his ability to work during the second quarter filing period." That is, after reviewing the testimony and evidence, the hearing officer simply was not persuaded that the claimant had sustained his burden of proving that he made a good faith effort to look for work in the filing period for the second quarter. Our review of the record does not reveal that the hearing officer's good faith determination is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse that determination, or the determination that the claimant is not entitled to second quarter SIBS, on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The claimant also asserts that the hearing officer erred in admitting an investigation report, arguing that the report was not timely exchanged and because the "information obtained during their investigation did not fall within the filing period." The hearing officer apparently admitted that document because she believed the self-insured exercised due diligence in obtaining the surveillance report after the benefit review conference and exchanged it as soon as it became available. We find no abuse of discretion in the hearing officer's having so found. Nonetheless, we further note that in order to obtain a reversal for the admission of evidence, the claimant must demonstrate that the evidence was actually erroneously admitted and that "the error was reasonably calculated to cause and probably did cause rendition of an improper judgment." Hernandez v. Hernandez, 611 S.W.2d 732,

737 (Tex. Civ. App.-San Antonio 1981, no writ). It has also been held that reversible error is not ordinarily shown in connection with rulings on questions of evidence unless the whole case turns on the particular evidence admitted or excluded. Atlantic Mut. Ins. Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). In this instance, any error in the admission of the self-insured's exhibit simply does not rise to the level of reversible error. The hearing officer was not persuaded by the claimant's evidence that he engaged in a good faith job search in the filing period. As a result, we cannot agree that the admission of a surveillance report concerning the claimant's daily activities over a four-day period was reasonably calculated to, and probably did, cause the rendition of an improper judgment. Accordingly, any evidentiary error was harmless and would not provide a basis for reversing the decision and order on appeal.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Alan C. Ernst
Appeals Judge